IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1359 OF 2005

Shivaji Yashwant Bhagat & Anr. ...Appellants
Vs.
Narayan Hari Bhagat (deceased
through legal representatives ...Respondents

Mr N.J. Patil for the Appellants.
Mr R.V. More for the Respondent Nos.1 and 2.

CORAM : A. S. OKA, J.
DATE : MAY 03, 2006.

P.C.:

1. Heard Shri N.J. Patil appearing for the Appellants. The Second Appeal is filed by the original Defendants. The Trial Court decreed the suit filed by the Respondents-Plaintiffs for redemption of mortgage dated 08th April, 1968. Both the courts below have held that the nature of the transaction between the parties is a mortgage by conditional sale and there is no absolute sale.

2. Shri N.J. Patil appearing for the Appellants has invited my attention to the decision of the learned Single Judge of this Court in the case of Vamanrao Sawalaram Bhosale & Ors. Vs. Vithal Tukaram Kadam & Anr. (2002(1) Mharashtra Law Journal Page 867). He submitted that in view of paragraph Nos.5

and 6 of the said decision, the transaction in question cannot be held to be a mortgage. He submitted that there is no evidence to show that relationship of debtor and creditor was created between the parties. Secondly, he submitted that evidence on record shows that the Respondents did not make any efforts to tender the mortgage money and therefore, decree for redemption of mortgage could not have been passed.

3. I have considered the submissions. After referring to the recitals in the document the courts below have come to the conclusion that the real intention of the parties was to create a mortgage. The Appellate Court has referred to the recital which permits redemption. The Appellate Court has also recorded a finding regarding existence of loan transaction. The Appellate Court has held that the Appellant No.1 Shivaji had no personal knowledge about the transaction as he must be eleven years old at the time of transaction. The Appellate Court observed that the Appellant No.2 (Defendant No.2) had knowledge about transaction and the said fact was admitted by the Appellant No.1 in his cross-examination. The

Appellate Court has observed that no attempts were made to examine the Appellant No.2 who had knowledge about real nature of the transaction. On the basis of the recitals in documents and on the basis of oral evidence on record, a finding was recorded that transaction was of a mortgage by conditional sale. No interference can be made with the findings recorded by the courts below.

4. So far as second submission is concerned, I find from the judgment of the Appellate Court that the second submission was not canvassed before the Appellate Court. The second submission is really a submission based on factual aspect and therefore, same cannot be permitted to be made for the first time in the Second Appeal. It is tried to be pointed out that in Trial Court said submission was canvassed. However, that is not enough. In the First Appeal preferred by the Appellant, the said submission is not made. There is no merit in the Second Appeal. Appeal is dismissed. No orders as to costs.

JUDGE